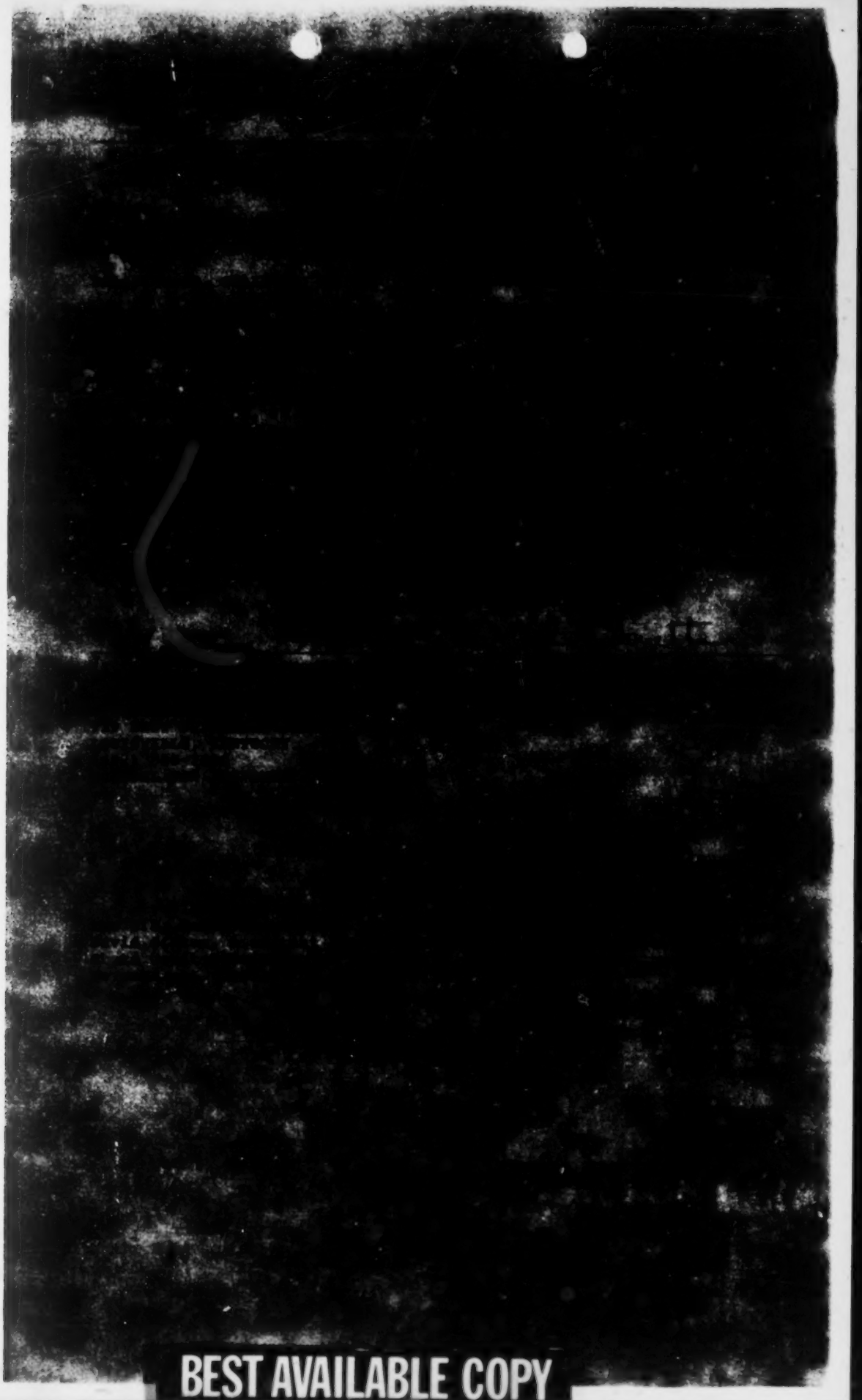

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TABLE OF CONTENTS

		PAGE
TABLE OF AUTHORITIES		ii
INTRODUCTION		1
ARGUMENT I:	Petitioners Misstate the Law When They Claim a Presumption of Regularity for Guilty Plea Records That Do Not Affirmatively Show a Knowing and Voluntary Plea.	1
ARGUMENT II:	The Federal Appellate Court Was Not Required to Defer to the "Findings" of the Supreme Court of Kentucky.	8
CONCLUSION		10

TABLE OF POINTS AND AUTHORITIES

CASES	PAGE
Boykin v. Alabama, 395 U.S. 238 (1969)	passim
Brady v. U.S., 397 U.S. 742 (1970)	passim
Burgett v. Texas, 389 U.S. 109 (1967)	3,4
Commonwealth v. Gadd, 665 S.W.2d 915 (Ky., 1984)	3
Cooper v. Aaron, 358 U.S. 1, 18-19 (1958)	4
Dunn v. Commonwealth, 703 S.W.2d 874 (Ky., 1985)	2,4,9
Dunn v. Simmons, 877 F.2d 1275 (6th Cir., 1989)	2,5,9
In Re Tahl, 460 P.2d 449 (Cal., 1969)	7
Lacey v. People, 775 P.2d 1 (Colo. Banc., 1989)	7
Lewis v. Commonwealth, 472 S.W.2d 65 (Ky., 1971)	2,8
Loper v. Beto, 405 U.S. 473 (1972)	5
Luna v. Black, 772 F.2d 448 (8th Cir., 1985)	5
Mabry v. Johnson, 467 U.S. 504, 508 (1984)	3,9
Marshall v. Lonberger, 459 U.S. 422 (1983)	5
People v. Harris, 459 N.E.2d 170 (NY, 1983)	6
People v. Sumstine, 687 P.2d 904 (Cal., 1984)	7
Robards v. Rees, 789 F.2d 379 (6th Cir., 1986)	5
Roddy v. Black, 516 F.2d 1380, 1384 (6th Cir., 1975)	5,9
State v. Annino, 613 P.2d 84 (Ore. App., 1980)	7
Todd v. Lockhart, 490 F.2d 626 (8th Cir., 1974)	6
U.S. v. Broce, ___ U.S. ___, 102 L.Ed.2d 927, 109 S.Ct. 757 (1989)	3,9
U.S. v. Pricepaul, 540 F.2d 417 (9th Cir., 1976)	6
Watkins v. People, 665 P.2d 834, 837 (Colo., 1982)	7
Weatherford v. Commonwealth, 703 S.W.2d 882 (Ky., 1986)	2

CONSTITUTION PROVISIONS AND STATUTUES	
Rule 22, Rules of Supreme Court	1
Rule 17, Rules of Supreme Court	1
28 USC §2254(d)	1
Ky. Rev. Stat. 532.080	3
Constitution, Article 6	4

OTHER AUTHORITIES	
Bellacosa's 1984 Supplement to the Commentary of Section 400.21 of New York's Criminal Procedure Law 11A McKinney Consol. Laws, Crim. Proc. Law, §400.21, 1989 Pocket Part, p. 63	6

INTRODUCTION

Pursuant to Rule 22 of the Rules of this Court respondent, Gene Morris Dunn, Jr., by counsel, moves the Court to deny the petition for certiorari filed in this case on behalf of Simmons and Cowan because the petitioners do not state sufficient grounds to demand the attention of this Court under the criteria set out by Rule 17. The petition in this case is based on two flawed premises: (1) that a guilty plea judgment that does not affirmatively show the entry of a voluntary and intelligent plea is entitled to a presumption of regularity and (2) that the Sixth Circuit Court of Appeals was prohibited by considerations of federal comity from applying federal law to this issue and rejecting the "findings" of the Supreme Court of Kentucky. As to the first point made, petitioners ask for relief because of a purported conflict between Kentucky and Sixth Circuit law, a usurpation by the Sixth Circuit of Kentucky's prerogative to establish its own criminal procedure and evidence rules, a conflict between the Sixth Circuit decision and decisions of other state appellate courts and finally, a claim that the Sixth Circuit Court of Appeals opinion unnecessarily hampers Kentucky's efforts to deal with recidivists. As to the second point, petitioners claim that the Sixth Circuit was required to defer to the Supreme Court of Kentucky's findings of fact by 28 USC §2254(d), that considerations of federalism prohibit the Sixth Circuit from enacting a rule governing Kentucky procedure, and finally, that in any event, the burden of proof in cases like this cannot be clear and convincing evidence. These points are countered easily, but before doing so, it would be well to examine the basics of guilty plea law and the law governing the use of prior convictions to enhance sentences.

(1) Petitioners Misstate the Law When They Claim a Presumption of Regularity for Guilty Plea Records That Do Not Affirmatively Show a Knowing and Voluntary Plea.

Throughout the petition, Simmons and Cowan claim that the prior guilty plea convictions attacked by Gene Dunn in the state court were entitled to a presumption of regularity normally accorded a state court judgment. (Petition, p. 13, 15, 16, 17, 21). But, as

noted both in Dunn v. Commonwealth, 703 S.W.2d 874 (Ky., 1985) and Dunn v. Simmons, 877 F.2d 1275 (6th Cir., 1989) there were no transcripts at all in the 1970 and 1973 pleas. In the 1976 conviction, the transcript only revealed that Dunn was asked if he understood his right to jury trial and whether he was satisfied with the services of his attorney. [703 S.W.2d at 876; 877 F.2d at 1278]. On these facts, petitioners' claim cannot be sustained.

In Boykin v. Alabama, 395 U.S. 238 (1969) this Court at two points stated that

> "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." [395 U.S. at 242].

And

> "The three dissenting justices in the Alabama Supreme Court stated the law accurately when they concluded that there was reversible error because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty." [395 U.S. at 244].

To dispel any doubt about the effect of Boykin, the Court in Brady v. U.S., 397 U.S. 742 (1970) wrote

> "4. The requirement that a plea of guilty must be intelligent and voluntary to be valid has long been recognized. * * * The new element added in Boykin was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily. [397 U.S. at 747].

These requirements have been recognized by Kentucky courts since the early 1970's. [Lewis v. Commonwealth, 472 S.W.2d 65 (Ky., 1971); Weatherford v. Commonwealth, 703 S.W.2d 882 (Ky., 1986)]. It is therefore difficult to understand petitioners' insistence on a presumption of regularity for judgments and records that do not show affirmatively the entry of a knowing and voluntary guilty plea. These records show error, plain on their face. Such records cannot be given a presumption of regularity without undercutting the reason for the affirmative showing requirement. That reason, as stated in Boykin, was that a plea of guilty is more than an admission of conduct, it is the conviction itself. In order to prevent such convictions through ignorance, incomprehension, coercion, terror,

inducements or threats the Court instituted the rule that the trial judge must "canvass" the issue with the defendant and must leave a record of so doing. [395 U.S. at 244-243]. It is to insure that guilty pleas represent the informed, free-will choice of the defendant that the on the record canvass requirement of Boykin exists. A knowing and voluntary plea, made upon reasonable advice of counsel is all but impervious to collateral attack. [Mabry v. Johnson, 467 U.S. 504, 508 (1984); U.S. v. Broce, ___ U.S. ___, 102 L.Ed.2d 927, 109 S.Ct. 757 (1989)]. Therefore, to make sure that this nearly irrevocable step is taken advisedly, this Court has insisted on a record that allows a reviewing court to determine that the plea was the knowing and voluntary act of the defendant. Petitioners' claim that the silent records in this case are entitled to a presumption of regularity simply is untenable. These records show error plain on their face. It is elementary law that the proponent of evidence must show to the court that the evidence it proposes to introduce is what it purports to be. Guilty plea convictions that do not comply with Boykin cannot be used in criminal penalty enhancement cases. To do so would violate the rule set out by this Court in Burgett v. Texas, 389 U.S. 109 (1967). The Sixth Circuit in this case has in no way usurped the right of the Commonwealth of Kentucky to order its own procedure. It has done no more than apply clear and long-established rules of federal constitutional law to the facts of this case. This is the function of the writ of habeas corpus. Therefore, the petitioners err when they claim a presumption of regularity for the records in this case.

The problem in this case stems from the case of Commonwealth v. Gadd, 665 S.W.2d 915 (Ky., 1984) in which the Supreme Court of Kentucky ruled that the admission of a prior criminal conviction could be had simply by introducing evidence showing the fact of its entry. In Gadd, the Supreme Court of Kentucky noted that Ky. Rev. Stat. 532.080 "does not specify that the Commonwealth must affirmatively prove both the fact of conviction and that the previous conviction was not obtained by constitutionally impermissible means. [665 S.W.2d at 917]. Gadd was a right to counsel case. In Dunn v. Commonwealth, 703 S.W.2d

874, 876 (Ky., 1985) respondent presented the Supreme Court of Kentucky with a guilty plea case. The Supreme Court of Kentucky set out a procedure in which it stated that the only initial burden of the Commonwealth was to prove the existence of a judgment of conviction for each offense it intended to use. "The presumption of regularity of judgment shall be sufficient to meet the original burden of proof". After the judgments were introduced, according to the Kentucky court, "the burden shifts to the defendant to show an infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, (citation omitted), or other pertinent cases." The Supreme Court of Kentucky insisted that the defendant testify or give other "affirmative evidence" to refute the "presumption of regularity". Once the defendant did so, then the burden fell to the Commonwealth "to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant." [703 S.W.2d at 876].

The operation of the rule is demonstrated in the opinion of the Kentucky Supreme Court. According to the Supreme Court of Kentucky, no evidence was given to rebut the presumption of regularity in relation to the 1976 conviction. [703 S.W.2d at 876]. This conviction was devoid of any but the most rudimentary showing of a knowing and voluntary plea. However, the Supreme Court of Kentucky refused to consider the validity of this prior conviction and proceeded on to decide only the 1970 and 1973 convictions about which Dunn did testify. The state Dunn rule, as it came to be called, ignores the clear dictates of Boykin and Burgett v. Texas. Kentucky cannot be allowed to create such a rule. Boykin says that a guilty plea record that does not show affirmatively the entry of a knowing and voluntary plea shows invalidity, clear on its face. Burgett says that no constitutionally invalid conviction may be used to enhance a criminal sentence. This Court's rulings are the authoritative construction of the constitution and therefore, Kentucky may not deviate from these clearly established rules. [Constitution, Article 6; Cooper v. Aaron, 358 U.S. 1, 18-19 (1958)]. The validity of a guilty plea is obviously a matter of

federal constitutional law. [Marshall v. Lonberger, 459 U.S. 422 (1983)].

In its opinion, the Sixth Circuit Court of Appeals did no more than hold that federal law controls the determination of the validity of the guilty plea and that the Kentucky Dunn rule ". . . ignores the Supreme Court's admonition in Boykin against presuming a waiver from a silent record." [Dunn v. Simmons, 877 F.2d 1275, 1277-1278 (6th Cir., 1989)]. There can be no legitimate complaint against this ruling; it only states the law as it has been since 1969. Therefore, the keystone of petitioners' argument, the purported "presumption of regularity" attributed to state court judgments, has been knocked out. The remaining arguments of the petition based on it necessarily must fail.

There is a conflict between Kentucky and the Sixth Circuit Court of Appeals on this issue. This does not mean that certiorari is necessary. Dunn v. Simmons is less than six months old at the time of this writing. The Supreme Court of Kentucky has not indicated that it intends to ignore the reasoning of the Sixth Circuit nor should this Court presume that the Supreme Court of Kentucky will insist on its own rule in the future. Although the Supreme Court of Kentucky is not bound by Dunn v. Simmons as precedent, until there is an indication that Kentucky will ignore that decision the purported conflict claimed by petitioners exists only on paper.

The federal cases cited on pages 15-17 of the petition are inapposite and do not establish the point petitioners wish them to. These cases do not deal with guilty pleas. Loper v. Beto, 405 U.S. 473 (1972) is a right to counsel case, as are Robards v. Rees, 789 F.2d 379 (6th Cir., 1986) and Luna v. Black, 772 F.2d 448 (8th Cir., 1985). This Court has not set out any affirmative showing requirement for right to counsel cases. Only guilty plea cases, involving pleas that are themselves the conviction, have such a requirement. Where guilty pleas are concerned, the federal Courts of Appeal are largely in agreement with the Sixth Circuit Court of Appeals. In Roddy v. Black, 516 F.2d 1380, 1384 (6th Cir., 1975), a case on which the decision in Dunn v. Simmons is based, the Sixth

Circuit noted that both the Fifth and the Seventh Circuits agreed that in the absence of an adequate transcript of a guilty plea the state must make a clear and convincing showing that the plea was in fact knowingly and understandingly entered. In Todd v. Lockhart, 490 F.2d 626 (8th Cir., 1974) that court also ruled that where the record was inadequate, the state had the burden of proving by extrinsic evidence the validity of the plea. Also, in U.S. v. Pricepaul, 540 F.2d 417 (9th Cir., 1976) that court ruled that where the record is silent about whether the defendant entered his guilty plea in a knowing and voluntary manner the state must go forward with evidence to prove validity. Each of these cases was based on the clear statement of this Court in Boykin v. Alabama that the record must reflect affirmatively the knowing and voluntary entry of a guilty plea. Thus, the law is quite the contrary to the claim of petitioners in this case. Where guilty pleas are concerned, precedent of long standing in several circuits agrees with the procedure followed by the Sixth Circuit in this case.

Nor does the opinion of the Sixth Circuit Court of Appeals in this case conflict with decisions of other states as claimed by petitioners. People v. Harris, 459 N.E.2d 170 (NY, 1983) relied on by petitioners is explained in Bellacosa's 1984 Supplement to the Commentary of Section 400.21 of New York's Criminal Procedure Law. [11A McKinney Consol. Laws, Crim. Proc. Law, §400.21, 1989 Pocket Part, p. 63]. As explained in that case, five of the six defendants involved in Harris complained about records of their guilty pleas that showed "minor omissions in the plea allocutions at the time of the entry of the predicate felony plea." However, one defendant, Vargas, presented a record that showed "no discussion whatsoever between the trial judge and defendant" and therefore his claim of an unintelligent plea was sustained by the court. The point of Harris, as made clear by this Commentary, is that where the record is completely silent, New York courts will not presume the plea to be knowing and voluntary. Obviously, New York practice under Harris more closely resembles the procedure outlined by the Sixth Circuit than the rules set out by the Commonwealth of Kentucky.

The Colorado rule is not substantially different from that of the Sixth Circuit Court of Appeals. In Lacey v. People, 775 P.2d 1 (Colo. Banc., 1989) that court listed its procedures for the challenge of a prior guilty plea. That court held that an unconstitutionally obtained prior conviction could not be used in a subsequent enhancement proceeding, that due process requires a guilty plea to be voluntary, that to establish voluntariness the record generated at the plea "as a whole" must "affirmatively demonstrate that the defendant understood the constitutional rights he was waiving and the critical elements of the crime . . .", that a reviewing court could not presume from the mere fact that a guilty plea was entered that the defendant waived his constitutional rights and understood the elements of the crime, and, that a prima facie showing by the defendant challenging his conviction is made when the evidence, in the light most favorable to the defendant, will permit the court to conclude that the conviction failed to meet relevant constitutional standards. [775 P.2d at 4-6]. The fair conclusion from this rule is that a defendant who shows a record of a guilty plea that does not comply with Boykin will make the required prima facie showing. Watkins v. People, 665 P.2d 834, 837 (Colo., 1982) when read in the light of the later case, (Lacey) follows this rule.

The Oregon case cited by petitioners, State v. Annino, 613 P.2d 84 (Ore. App., 1980) is inapposite because it is a right to counsel case. Because there is no requirement of affirmative showing in right to counsel cases it is clear that Annino has little to add to the petitioners' argument.

Another case cited by petitioners, People v. Sumstine, 687 P.2d 904 (Cal., 1984) is somewhat unclear. A close reading of the rule set out in Sumstine appears to be that a defendant challenging a predicate conviction cannot rely solely on the state court rule (established in In Re Tahl, 460 P.2d 449 (Cal., 1969) that requires enumeration and express waiver of the three trial rights announced in Boykin. [687 P.2d at 906; 913]. The court also ruled that it could not see why a guilty plea case should be handled any differently from any other type. [687 P.2d at 913]. The obvious answer to this is that this Court in Boykin v. Alabama and Brady v.

U.S. has told the courts that guilty pleas are to be handled differently. In any event, it is plain that there is no great conflict among the jurisdictions. If there is a conflict between the Sixth Circuit Court of Appeals and other courts, it is with only two other courts, New Mexico and California. Petitioners do not explain why the mere existence of conflict justifies the attention of this Court. This petition for certiorari is not the logical vehicle for settling questions of California or New Mexico law. Therefore, this reason for review must be rejected.

As a last reason for review petitioners claim that the Sixth Circuit Court of Appeals has made a ruling that will hamper Kentucky's prosecution of recidivists. This argument also is based on a false premise. If Kentucky is hampered or prevented from prosecuting recidivists it will be because it failed to read this Court's decisions and apply them consistently. No state can claim that the court did not say clearly in Boykin v. Alabama and Brady v. U.S. what it wanted to be done. Certainly, as shown in Lewis v. Commonwealth, 472 S.W.2d 65, 66 (Ky., 1971) Kentucky courts were on notice that the trial judge in guilty plea cases was to discuss the plea with the defendant and make a record of that discussion that would allow a reviewing court to determine that the plea was knowing and voluntary. Kentucky did not do so. Therefore, if any problem exists, it is the fault of Kentucky, not the fault of the Sixth Circuit Court of Appeals for applying long and well-established federal constitutional law precedents. Petitioners have not stated any reason to grant review under this heading of their argument.

(2) The Federal Appellate Court Was Not Required to Defer to the "Findings" of the Supreme Court of Kentucky.

The short answer to petitioners' complaint about deference is that they have not been able to convince any federal judge that the evidentiary holdings of the Supreme Court of Kentucky are entitled to deference. Nor is petitioners' argument about the standard of proof convincing. A guilty plea case must have a more severe burden of proof because a guilty plea is different from any type of evidence.

> "A guilty plea is more than a confession which admits that the accused did various acts . . . it is an admission that he committed the crime charged against him." [U.S. v. Broce, ___ U.S. ___, 102 L.Ed.2d 927, 936, 109 S.Ct. 757 (1989)].

When the accused has voluntarily and knowingly pleaded guilty, collateral attack with, rare exceptions, is foreclosed. [Mabry v. Johnson, 467 U.S. 504, 508 (1984)]. Because of the gravity of the guilty plea this Court established the Boykin rule which requires generation of a record that allows a reviewing court to be satisfied that the plea was knowing and voluntary. When that rule is not followed, as in this case, the state must, if it can, show by extrinsic evidence that the plea was knowing and voluntary. [Roddy v. Black, 516 F.2d 1380, 1384 (6th Cir., 1975)]. But the evidence available to the state, in the absence of satisfactory records, will in most cases be the "murky memories" of the participants in the earlier action. [Boykin v. Alabama, 395 U.S. 238, 244 (1969)]. It is for this reason that the clear and convincing standard must be followed. Any lesser standard would allow the state to profit from its previous disregard of the clear direction of this Court in Boykin v. Alabama. Any other standard would erode the confidence that courts can have in guilty pleas as a result of the Boykin rule. Therefore, the Sixth Circuit correctly applied the clear and convincing standard.

The reliability of the fact finding of the Supreme Court of Kentucky can be determined by comparison of its rendition of the evidence and that set out by the Sixth Circuit Court of Appeals. In Dunn v. Simmons, 877 F.2d at 1278 , the Sixth Circuit correctly noted that the record showed that at the suppression hearing Dunn testified that he was not advised by the trial judge of his rights to jury trial, cross-examination, or silence. (NR.2, Appendix 27-28; 29; 30; 35; 37). Upon cross-examination by the state, Dunn admitted that he had knowledge "now from the trials I had" that he was entitled to a jury trial and could cross-examine witnesses, but he said that he did not understand anything back in 1970 and 1973. (NR.2, Appendix 35, 27, 41). In Dunn v. Commonwealth, 703 S.W.2d 874, 876 (Ky., 1985) the Supreme Court of Kentucky stated that "no

evidence was given to rebut the presumption of regularity in relation to the 1976 conviction." The Supreme Court of Kentucky noted that Dunn had testified that the trial judge failed to advise him of certain rights prior to the entry of the guilty plea in 1970 and 1973. Then the Supreme Court of Kentucky concluded that on cross-examination ". . . he readily admitted that he knew of the rights about which he contends he was not informed by the court." It is clear from a reading of the opinions and the record that the Supreme Court of Kentucky misread the transcript of proceedings. Its claim that Dunn introduced no evidence concerning the 1976 conviction was flatly wrong. The record of the plea was evidence. Its determination that Dunn admitted knowing his rights simply was a misreading of the record in which Dunn conceded that he had knowledge as of the time of the suppression hearing in the instant action as a result of later jury trials. But Dunn stated that he did not understand anything in 1970 or 1973. Petitioners cannot demand deference to such sloppy handling of the record. The Sixth Circuit Court of Appeals had access to the same paper transcript used by the Supreme Court of Kentucky. The words on the paper did not change. The Sixth Circuit however correctly read those words. For this reason petitioners cannot realistically claim deference to the determinations of the Supreme Court of Kentucky. For this reason, review should be denied.

CONCLUSION

For the reasons set out above, the Court is urged to deny the petition for writ of certiorari requested in this case.

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